

**IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
October 2002 Session**

SUSAN ALVA ROSE NORRIS V. LESLIE RAY NORRIS

**Appeal from the Circuit Court of Davidson County
No. 89D-3149, Muriel Robinson, Judge**

No. M2002-00147-COA-R3-CV - Filed December 31, 2002

This appeal arises from a post-divorce contempt petition where the petitioner mother alleged the respondent father failed to provide income information required by a previous court order. The trial court entered a judgment for past due child support in the amount of \$34,950 and awarded attorney's fees in the amount of \$1,000. On this appeal, the father contends the judgment violates the prohibition against retroactive modification of child support, Tenn. Code Ann. § 36-5-101(a)(5) and that the award of attorney's fees was error. We reverse the judgment for past due child support and affirm the award of attorney's fees.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed in Part; Reversed in Part**

W. MICHAEL MALOAN, S.J. delivered the opinion of the court to which BEN. H. CANTRELL, P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Clark Lee Shaw, Nashville, Tennessee, for the appellant, Leslie Ray Norris

D. Scott Parsley, Joshua G. Strickland, Nashville, Tennessee, for the appellee, Susan Alva Rose Norris

OPINION

The relevant facts are not in dispute. Susan Alva Rose Norris (mother) and Leslie Ray Norris (father) were divorced in the Probate Court for Davidson County on April 11, 1990. The divorce decree incorporated a marital dissolution agreement which granted custody of the parties' minor child to the mother and required the father to pay child support.

Post-divorce, various petitions for contempt regarding support and visitation were filed and heard. In an October 13, 1994 order setting a child support arrearage and increasing support, the court ordered:

4. That the Respondent (father) shall provide the Petitioner (mother) with copies of all of his current W-2 forms and 1099 forms on the 1st day of May of each year beginning in 1995.

The undisputed proof at trial was the father failed to provide any of this information and the mother did not petition the court to require him to do so.

The record does not disclose any further proceedings until October 23, 2000 when the father filed a petition for a change of custody. On November 20, 2000, the mother answered and filed a counter-petition for contempt for failure to reimburse the mother for the costs of medical insurance; failure to pay one-half (½) of medical expenses; failure to maintain a life insurance policy; and failure to provide the income information required in the 1994 order. The mother sought judgments for the costs of medical insurance, medical expenses, back child support that would have been payable if the income information was provided and the child support modified accordingly and for her attorney's fees.

The trial court dismissed the father's petition for change of custody on July 24, 2001. On November 29, 2001, the trial court heard the wife's counter-petition for contempt. After a brief hearing, the trial court found the father had no valid excuse for not providing his income information for the years 1996 through 2000 and awarded a judgment for past due child support in the amount of \$34,956.00, the stipulated amount of child support that would have been paid if the father had provided the required financial information and the child support had been modified accordingly. Further, the trial court entered judgments for past due medical premiums of \$1,888.44, one-half (½) of medical expenses of \$175.59, and for the father to provide a \$75,000 life insurance policy as required of the divorce decree. The trial court awarded attorney's fees in the amount of \$1,000 to the mother's counsel. The father has appealed the trial court's judgment for back child support and the award of attorney's fees.

Appellate review of a non-jury case is *de novo* on the record, accompanied by a presumption of correctness unless the evidence preponderates against the trial court's factual findings. Tenn. R. App. P. 13(d), *Doles v. Doles*, 848 S.W.2d 656, 661 (Tenn. Ct. App. 1992). No presumption of correctness attaches to the lower court's conclusions of law. *Jahn v. Jahn*, 932 S.W.2d 939, 941 (Tenn. Ct. App. 1996). Further, where the material facts are not in dispute, as in this case, the scope of review is *de novo* with no presumption of correctness. *Union Carbide v. Huddleston*, 854 S.W.2d 87 (Tenn. 1983).

BACK CHILD SUPPORT

The father contends the trial court's judgment for back child support for the years 1996 through 2000 based on a petition to modify filed November 20, 2000 violates Tenn. Code Ann. § 36-5-101(a)(5) which states in part:

(5) Any order for child support shall be a judgment entitled to be enforced as any other judgment of a court of this state and shall be entitled to full faith and credit in this state and in any other state. Such judgment shall not be subject to modification as to any time period or any amounts due prior to the date that an action for modification is filed and notice of the action has been mailed to the last known address of the opposing parties....

The mother submits the father should not be rewarded for failure to provide the required financial information and avoid paying the proper amount of child support he would have been obligated to pay. The mother states this practice violates the public policy of this state which requires a parent to support his or her children.

In *Rutledge v. Barrett*, 802 S.W.2d 604, 606 (Tenn.1991), the Tennessee Supreme Court held Tenn. Code Ann. § 36-5-101(a)(5) prohibits retroactive modification of child support orders. In a recent case on nearly identical facts, the Eastern Section Court of Appeals in *Thomas v. Thomas*, No. E2001-00191-COA-R3-CV (Tenn. App. Oct. 23, 2001) held as follows:

Mother argues that she is entitled to an award of compensatory damages for Father's breach of MDA in failing to provide her copies of his tax returns for the years 1995 to 1999. She asserts that such damages should be based upon the difference between Father's actual child support obligation during that time and the amount he would have been required to pay according to his gross income reported on these returns.

Mother has cited no authority, nor are we aware of any, to support an award of compensatory damages for this type of breach of a MDA. Moreover, we note that in seeking these damages, Mother is in essence requesting a retroactive modification of Father's child support obligation for the four years prior to the filing of her December, 1999, petition. A child support judgment may not be modified "as to any time period or any amounts due prior to the date that an action for modification is filed..." Tenn. Code Ann. § 36-5-101(a)(5) (Supp. 2000). Accordingly, Mother may not do indirectly what she is precluded from doing directly, that is, obtain a retroactive modification of Father's child support obligation for the years prior to the filing of her petition. We find this issue to be without merit.

In light of the clear language of Tenn. Code Ann. § 36-5-101(a)(5) and the holdings in *Rutledge* and *Thomas*, we find the trial court's judgment for back child support is in error and we reverse.

ATTORNEY'S FEES

The father has appealed the judgment requiring him to pay his wife's attorney's fees of \$1,000 and requests the payment of his attorney's fees on appeal. Tenn. Code. Ann. § 36-5-103(c) provides for the payment of attorney's fees within the trial court's discretion and unless the trial court's decision was against logic or reason, and cause an injustice or injury to the party complaining, the trial court's exercise of discretion will not be reversed on appeal. *Marcus v. Marcus*, 993 S.W.2d 596, 601 (Tenn. 1999).

Although the father has prevailed on appeal the back child support issue, the wife was the prevailing party at trial on numerous other issues. We find the award of attorney's fees was within the discretion of the trial court and we affirm. We deny the father's request for an award of attorney's fees for this appeal.

CONCLUSION

The judgment of the trial court granting a judgment for back child support is reversed. The trial court's award of attorney's fees to mother's counsel is affirmed. The father's request for attorney's fees on this appeal is denied. The costs of the cause are taxed to the mother-appellee, Susan Alva Rose Norris, and to her surety for which execution, if necessary, may issue.

W. MICHAEL MALOAN, S.J.